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714-040—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 591

ALEXANDER McDONALD, PETITIONER

v.

UNITED STATES OF AMERICA AND BETHLEHEM STEEL CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's decision (R. 264a–272a)[1] is not reported. The opinion of the court of appeals (Pet. App. 18) is reported at 321 F. 2d 437.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1963. The petition for certiorari was filed on October 30, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the appendix to petitioner's brief in the court of appeals. "Pet. App." refers to the appendix to the petition for certiorari.

QUESTIONS PRESENTED

1. Whether the district court was clearly erroneous in finding that the vessel on which petitioner was injured had been withdrawn from navigation, so that no warranty of seaworthiness applied.

2. Whether the district court properly denied recovery against a shipowner for injuries caused by alleged failure to supply a safe place to work where exclusive possession and control over the vessel had been yielded to an independent contractor.

STATUTE INVOLVED

The Public Vessels Act (Act of March 3, 1925, ch. 428, 43 Stat. 1112, 46 U.S.C. 781, *et seq.*) is set forth, in pertinent part, at page 4 of the petition.

STATEMENT

Petitioner, an employee of the Bethlehem Steel Co., brought this personal injury action under the Public Vessels Act, 46 U.S.C. 781–790, against the United States, as owner of the ship on which he was injured, alleging (1) breach of warranty of seaworthiness and (2) negligence. The United States impleaded Bethlehem Steel Co., the independent contractor in whose possession the vessel was at the time of the injury.[2] After a full trial, the district court entered findings of

[2] Originally the libel was against the United States and American Export Lines. The libel against American Export Lines was dismissed with prejudice by stipulation of the parties (Pet. 18). An earlier civil suit against Export Lines was similarly dismissed with prejudice. See 46 U.S.C. 745, providing statutory immunity to a husbanding agent.

fact and conclusions of law and dismissed the libel and the impleading petition. The court of appeals affirmed.

The findings of the district court, which the court of appeals held to be "amply supported by the evidence" (Pet. 19), can be briefly summarized: The S.S. Exochorda, formerly owned by American Export Lines, had been out of service for approximately a year, and its Coast Guard certificate of inspection had expired some five months before it was sold to the United States on March 16, 1959. The sale was made under a contract which required Export Lines to have the vessel completely overhauled, repaired, and deactivated for retirement into the reserve or "mothball" fleet (R. 267a). The work was to be done in accordance with NSA Order No. 64 (OPR–4, Revised)[3] and with specifications prepared by Export Lines. A contract for much of this work was awarded to Bethlehem Steel Co. (R. 267a). On March 16, 1959, the vessel was towed to Bethlehem's shipyard, without steam, power, or crew (R. 268a). Work was started on March 17, 1959. While the work was in progress, several employees of Export Lines and a Maritime Administration inspector were on board from day to day to inspect the work, to see if the specifications were met, and to guard against pilferage (R. 270a). There was no supervision, direction, or control by the United States as to how, where, or by whom the work was to be done, sole control of such matters being in Bethlehem Steel (R. 270a). On the morning of April 1,

[3] 32A C.F.R. (Cum. Supp.) 154 (1958 Revision) (R. 256a).

1959, when the major repair work had been completed (R. 268a), petitioner, a painter employed by Bethlehem Steel who had come on board to finish some paint work, was injured when he fell through an opening created by the removal of two boards from a hatch cover. The boards, which had been located in the deck of a hold which was not along the "customary route" from the laundry room to the fore peak (petitioner's points of departure and destination) (R. 269a), had been removed by employees of Bethlehem Steel on the order of a job supervisor (R. 270a), in order to allow access for inspection that day (R. 157a). At the time of the accident, the vessel's stern tube was disconnected and filled with preservative; her tail shaft was secured to prevent the turning of the propeller; her sea chests and all underwater overboard discharge lines were permanently blocked off; one shot of chain was disconnected from both the port and starboard anchor chains; the shaft alley drain well was cleaned out; the ship's gangways were stowed in a lower hold; life boats were removed and stowed in a lower hold; the radar scanner was dismantled; and all storage lockers were permanently sealed off (R. 268a; Pet. 19). The ship was no longer fit for navigation (R. 268a).

The district court concluded that the ship had been withdrawn from navigation as of April 1, 1959, so that there was no implied warranty of seaworthiness (R. 271a). As for the allegation of negligence, the district court concluded that Bethlehem Steel exercised sole possession and control over the vessel and that mere inspection over the progress of the work did not render

the United States responsible for the alleged failure to supply a safe place to work (R. 271a).

ARGUMENT

Both courts below correctly held that the warranty of seaworthiness is inapplicable to a deactivated ship which has been withdrawn from navigation and prepared for the "mothball" fleet, and that a shipowner is not responsible for injuries to the employees of an independent contractor if possession and control over the ship are yielded to the independent contractor. The district court's finding that the ship had been withdrawn from navigation was supported by substantial evidence, as were its findings regarding possession and control of the vessel. The decision is consistent with applicable decisions of this Court and of other courts of appeals, and there is no occasion for further review.

1. In *Roper* v. *United States*, 368 U.S. 20, 22–23, this Court held that whether or not a vessel has been withdrawn from navigation is a question of fact to be determined by the district judge, whose finding is "reversible only upon a showing of clear error." In the present case there was ample evidence to sustain the district court's finding that the ship on which petitioner was injured had been substantially deactivated and was not fit for navigation. Hence, as this Court concluded in the very similar circumstances presented in *West* v. *United States*, 361 U.S. 118, 122, "It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case." See also *Latus* v. *United States*, 277 F. 2d 264 (C.A. 2), certiorari denied, 364 U.S. 827.

Petitioner's contention that the *West* case is distinguishable because it concerned a ship being readied for *re*activation rather than preparations for *de*activation is without merit. In either instance it is clear that the shipowner does not represent his vessel's fitness for an ocean voyage. Indeed, there is all the more reason to deny an implied warranty of seaworthiness with regard to a vessel which is in the process of being "mothballed" than with one which is undergoing repairs for resumed use in navigation. The former manifests an intention on the shipowner's part not to permit the ship to go to sea without extensive overhaul; the latter suggests that at some point during the repair process the vessel might be seaworthy.

Nor is there any merit to petitioner's suggestion that the warranty of seaworthiness is not extinguished until the deactivated vessel has finally been "mothballed." As the Court of Appeals for the Fourth Circuit said in rejecting an identical claim, "A body is not less dead in the interval between expiration and interment, while it is still in the hands of the embalmer." *Noel* v. *Isbrandtsen Co.*, 287 F. 2d 783, 785, certiorari denied, 366 U.S. 975.

2. The district court's rejection of petitioner's negligence claim accorded with this Court's disposition of the identical contention in *West* v. *United States*, *supra* at 122. Having found, on the basis of substan-

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Petitioner's reliance upon a covenant in the bill of sale with regard to seaworthiness is frivolous. A formal covenant of seaworthiness in a bill of sale does not run to employees of a ship repair contractor. In any event, it would not survive major repairs and deactivation of the ship after sale.

tial evidence, that—as in *West*—the United States "had no control over the vessel, or power either to supervise or to control the repair work in which petitioner was engaged" (*ibid.*), the district court properly concluded that the United States "was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract"[5] (*ibid.*). The occasional presence of a Maritime Administration inspector aboard the ship no more affected this result than did the presence of similar "inspectors or observers" in *West*. See 361 U.S. at 123.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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NOVEMBER 1963.

[5] There is no claim of negligence in the selection of Bethlehem Steel Co. to perform the overhauling of the vessel. Nor is there any claim of any latent defect in the vessel at the time the owner turned it over to the independent contractor. The alleged negligence is based solely on the removal of two boards from a hatch cover during custody and possession of the vessel by Bethlehem Steel.

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